Supreme Court, U. S.
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No. —77-1376

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
The question is substantial	11
Conclusion	16
Appendix	1A

CITATIONS

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544 ..... 11, 12
Automobile Club v. *Commissioner*, 353 U.S. 180 14
Georgia v. *United States*, 411 U.S. 526 11
Perkins v. *Matthews*, 400 U.S. 379 ..... 11, 12, 16
Pitts v. *Cates*, 536 F. 2d 56 15
United States v. *San Francisco*, 310 U.S. 16 14
United States v. *Sheffield Board of Comm'rs*, No. 76-1662, decided March 6, 1978 ..... 12, 13, 16
Utah Power & Light Co. v. *United States*, 243 U.S. 389 14
White v. *Regester*, 412 U.S. 755 15

Statutes and regulations:

Voting Rights Act of 1965, 79 Stat. 437 *et seq.*, as amended, 42 U.S.C. (and Supp. V) 1973 *et seq.*:
- Section 4, 42 U.S.C. (Supp. V) 1973b 5
- Section 4(a), 42 U.S.C. (Supp. V) 1973b(a) 3, 5
- Section 4(b), 42 U.S.C. (Supp. V) 1973b(b) 3, 4, 5
- Section 5, 42 U.S.C. (Supp. V) 1973c 1, 2, 5, 7, 9, 11, 14, 15
- Section 12(d), 42 U.S.C. 1973j(d) 4
- Section 12(f), 42 U.S.C. 1973j(f) 4, 5

Ga. Laws 1964, Act No. 26 ..... 5, 6
- Section 34-1002 ..... 6, 8
- Section 34-1514 ..... 6, 8

257-968—78——1

	Page
Statutes and regulations—Continued	
Ga. Laws 1970, Act No. 1079 (H.B. 1304)	8
Section 34–1015	8
Section 34–1513	8
Ga. Laws 1971, Act No. 543	9
Ga. Laws 1972, Act No. 1359	9
28 C.F.R. 51.5	13
28 C.F.R. 51.10(a)(4)	13
Miscellaneous:	
30 Fed. Reg. 9897 (1965)	5

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, pp. 5A–13A) is not reported.

JURISDICTION

The three-judge district court entered an order on September 30, 1977, (App., *infra*, pp. 3A–4A) denying the declaratory and injunctive relief sought by the United States under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. (Supp. V) 1973c, and dismissing the action. The United States filed a notice of appeal (App., *infra*, p. 2A) on November 28, 1977.

On January 18, 1978, Mr. Justice Powell extended the time to docket the appeal until March 28, 1978 (App., *infra*, p. 1A). The jurisdiction of this Court rests on 42 U.S.C. (Supp. V) 1973c and 28 U.S.C. 1253. *Allen* v. *State Board of Elections*, 393 U.S. 544, 560–563; *Perkins* v. *Matthews*, 400 U.S. 379.

QUESTION PRESENTED

Whether Georgia's statewide mandatory majority vote and numbered post requirements for primaries and elections of county governing bodies has been submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act.

STATUTES INVOLVED

1. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c, provides, in relevant part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. * * * Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

2. Section 4(a) and (b) of the Voting Rights Act of 1965, 79 Stat. 438, as amended, 42 U.S.C. (Supp. V) 1973b (a) and (b), provide, in relevant part:

> (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two

sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *

* * * * *

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. * * *

3. Section 12(d) and (f) of the Voting Rights Act of 1965, 79 Stat. 444, 42 U.S.C. 1973j(d) and (f), provide:

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

STATEMENT

1. Section 5 of the Voting Rights Act, as amended, 42 U.S.C. (Supp. V) 1973c, bars a state or political subdivision covered by Section 4(a) and the first sentence of Section 4(b) of the Act from carrying into effect "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first obtaining the approval of the Attorney General or of the United States District Court for the District of Columbia. The State of Georgia is covered by the relevant provisions of Section 4 of the Voting Rights Act and is subject to Section 5's "preclearance" requirements. 30 Fed. Reg. 9897 (1965); see 411 U.S. 526, 528, n. 1.

In June 1964 the Georgia General Assembly passed, and the Governor signed into law, Act 26 (1964),

which revised the State Election Code. Section 34–1002 of the Act required candidates seeking federal, state or county offices in any primary or election to designate the specific office or post which they were seeking if there were two or more offices, each having the same title, to be filled at the same election by the vote of the same electors. Section 34–1514 of the Act required that candidates in primaries and elections be elected by majority vote. But there was an exception for county elections. Sections 34–1002 and 34–1514 each contained a provision stating that the section shall not apply to candidates seeking party nomination for or election to the governing authority of a county during the year 1964, and such candidates shall be governed by the county executive committee rules in such primaries and in accordance with any local act establishing such governing authority in the case of an election. It was stipulated that "[i]n at least eleven (11) counties in the State of Georgia in 1964 candidates for county commissions were nominated prior to November 1, 1964, and elected after November 1, 1964, by plurality vote and without numbered posts."

Neither the State of Georgia nor any of the counties implementing the provisions of Act 26 sought or obtained preclearance from the District Court for the District of Columbia or the Attorney General for implementing the new numbered post and majority vote requirements.

2. Four submissions to the Attorney General by the State of Georgia between 1968 and 1971 contained the

text of enactments that included numbered post and majority vote provisions identical to those in Act 26. In each instance, Georgia identified the changes it was submitting to the Attorney General, but did not indicate that the numbered post or majority vote provisions were changes from previous Georgia law, or that these procedures were being submitted for his review under Section 5 of the Voting Rights Act.

(a) In 1968, Georgia submitted to the Attorney General "acts adopted at the 1965 and 1966 sessions of the Georgia General Assembly * * *." In a twenty-one page memorandum, Georgia identified the submitted changes. The numbered post and majority vote provisions enacted in 1964 are not identified as changes or even mentioned in the memorandum, although they were embodied in the revised Georgia Election Code, attached to the submission as Exhibit B. The Assistant Attorney General's letter, dated June 27, 1968, to Georgia officials states that he has reviewed the "changes in the Georgia Election Code enacted by the 1965 and 1966 Sessions * * * [and] the Attorney General will not interpose an objection to any of the subject enacted changes."

(b) In June 1969, Georgia submitted to the Attorney General changes adopted in 1968 to the State Constitutions and changes enacted by the 1969 General Assembly to the State Code. In its twenty-three page memorandum identifying the submitted changes, Georgia did not identify either the numbered post or majority vote provisions as changes in Georgia law. The memorandum does not mention the numbered

post provision at all. In discussing amendments to Section 34–1514 relating to run-off elections, the memorandum says that the majority vote requirement is not a change: "Under Georgia law at present, no candidate, with certain stated exceptions not here relevant, can be nominated to public office unless ~~unless~~ he receives a majority of the votes cast in the primary or the election." The Assistant Attorney General wrote to Georgia officials stating that the Attorney General would not "interpose any objection to the enactments submitted by your letter of June 3, 1969."

(c) In March 1970, Georgia submitted to the Attorney General H. B. 1304, Act 1079, enacted by the 1970 session of the General Assembly. The State's submission letter to the Attorney General says:

> The purpose of the Bill is to place the conduct of political primaries under the supervision of the elected county and State officials. * * * The Bill revises the Election Code in all respects to reflect this intention, together with certain other minor housekeeping changes which are self-explanatory.

Act 1079 (H. B. 1304), which was attached to the submission letter, placed the majority vote and numbered posts provisions under different code numbers,[1] but again there was no indication that these provisions were being submitted for preclearance or that they were changes from the pre-November 1964 law. In his

[1] The numbered post provision, formerly Section 34–1002, became Section 34–1015. The majority vote requirement, formerly Section 34–1514, became Section 34–1513.

letter of May 22, 1970, to Georgia officials, the Assistant Attorney General stated that the Attorney General "will not at this time interpose an objection to the enactment or implementation of House Bill 1304."

(d) In April 1971, Georgia submitted to the Attorney General three acts and one resolution passed by the 1971 Session of the General Assembly. Neither the acts nor the resolution affected or changed the numbered posts provision of the Georgia Code. One of the acts, Act 543, modified the procedures for run-off elections, but neither the act nor the submission indicates that the majority vote requirement was a change from the pre-November 1964 law. The Assistant Attorney General wrote to Georgia officials on July 2, 1971, stating that the Attorney General would not interpose an objection to the submitted legislation.

3. In April 1972, the Georgia legislature enacted special legislation (Act No. 1359) authorizing Harris County, after a local referendum, to increase the membership of its Board of Commissioners from three to five. In September, after a favorable referendum, the change was submitted to the Attorney General under Section 5. The Assistant Attorney General responded in December. Although he made no objection to the increase in the number of commissioners, he did interpose an objection, in the name of the Attorney General, to the numbered post requirement included in the Act, noting that this rule, "coupled with the majority vote requirement under Georgia law, may well have the effect of diluting or minimizing the vot-

ing strength of blacks." This was done on the misapprehension that the numbered post rule was now, for the first time, being applied in Harris County.

Subsequently, it was represented that the numbered post system had been used in previous Harris County elections and was not a change. In light of this new information, which was construed as indicating that the numbered post requirement had applied to the county since 1964,[2] the Assistant Attorney General, by letter dated March 30, 1973 (App., *infra*, pp. 14A–15A), withdrew the previous objection. Erroneously, this letter also represents that the requirement had been cleared by the Attorney General in 1970.

4. On September 17, 1976, the Attorney General filed suit, on behalf of the United States, against the State of Georgia and state officials[3] seeking a declaration that the implementation of the changes in election procedures to majority vote and numbered post requirements in primaries and elections for county commissions without satisfying the preclearance pro-

[2] In fact, the representation was that the Harris County elections of *1966* and *1970* had been conducted under the numbered post system, albeit it was also said that this requirement had "been the law in Georgia since 1964." Presumably, there was no Harris County election between 1962 and 1966, and it is not possible to determine whether, had there been a 1964 election, the County would have taken advantage of the exemption in the June 1964 statute. In the circumstances, we believe Harris County must be treated as having obtained clearance, if it was needed.

[3] In addition to the State, defendants are the Governor, the Secretary of State, members of the State Board of Elections, the State Democratic Executive Committee, and its Chairperson, and the State Republican Executive Committee, and its Chairperson.

visions of Section 5 violates the Voting Rights Act, and an injunction prohibiting defendants from further implementing those changes until the preclearance requirements have been satisfied.

The three-judge district court, on cross motions for summary judgment, ordered that the action be dismissed. The court held that the changes to numbered posts and majority vote for primaries and elections of county commissions were subject to the preclearance requirements of Section 5, but that these requirements were satisfied by Georgia's submissions to the Attorney General between 1968 and 1971.[4]

THE QUESTION IS SUBSTANTIAL

1. It is of course settled that Section 5 of the Voting Rights Act reaches a change of the kind involved here—a shift from a system in which candidates for a multi-member government body elected at large need not designate the particular seat they are running for and are elected by plurality vote, to one requiring specification of a numbered post and election by majority vote. *Georgia* v. *United States*, 411 U.S. 526. See, also, *Allen* v. *State Board of Elections*, 393 U.S. 544; *Perkins* v. *Matthews*, 400 U.S. 379. And it is equally clear (as the district court ruled) that, in determining whether a "practice or procedure" is "different from that in force or effect on November 1,

[4] The district court held that the State had submitted its entire election code to the Attorney General in 1970 and that his failure to object at that time satisfied the requirements of Section 5, relying in part on the Assistant Attorney General's letter of March 30, 1973, to Harris County officials (*supra*), which so stated.

1964," one compares the *actual* practice followed then and now, regardless of any change in law. *Perkins* v. *Matthews, supra.* Accordingly, here, where State law did not then require, and many counties admittedly did not in fact apply, the numbered post and majority vote rules in 1964, a subsequent application of those rules was a change requiring preclearance.[5]

It follows that the only question of substance presented here is whether the Attorney General's failure to object to the submissions made in 1968, 1969, 1970 and 1971, combined with the 1973 letter to a Harris County official, amounts to an effective preclearance of the change. We submit the district court wrongly resolved this issue.

2. We believe the answer is now ruled by the Court's decision—unanimous on this point—in *United States* v. *Sheffield Board of Comm'rs,* No. 76-1662, decided March 6, 1978. It is there held that the Attorney General's inaction cannot be deemed clearance, even though he is put on notice, if the proposed change is "neither properly submitted" to him for approval nor "in fact evaluated by him." Slip op. at 25. Indeed, this is no more than an application of the principle already announced in *Allen, supra,* 393 U.S. at 571, that the State must submit the change "in some unambiguous

[5] The suggestion that the provisions of the 1964 Act — which required counties to follow the new rules for elections after 1964 — were repealed, thereby mooting our challenge, is, as the district court found, wholly frivolous. First, as we have noted, it is the change in practice, not the change in law, that matters. Moreover, as the court observed, the same requirements were carried over in the 1970 Election Code, albeit with new section numbers. See note 1, *supra*, p. 8.

and recordable manner." Thus, here, since Georgia never asked the Attorney General to clear the numbered post and majority vote requirements and he never purported to approve them, it is irrelevant whether he might have noticed the change for himself by a detailed examination of the enactments submitted to him for other purposes.[6]

Moreover, the Attorney General was not clearly put on notice of the proposed change by any of the State's submissions. Only the 1968 submission even reproduced the original provisions of the June 1964 law that temporarily exempted counties from the new numbered post and majority vote requirements. And, even if the Attorney General had noticed those provisions—which were not tendered to him for approval—he would not have known which counties had in fact followed the new procedures in 1964, as they were free, though not yet compelled, to do.

As for the 1970 submission—relied upon by the district court—it nowhere indicates that such a change had occurred. By then, the temporary exemption of counties from the numbered post and majority vote rules had been deleted as spent. The most detailed study of the new Election Code would not have alerted the Attorney General that these requirements were new—as, indeed, they were not in 1970. He relied,

[6] As the Court noted in *Sheffield Board of Comm'rs*, *supra*, slip op. 25 n. 26, 26-27, there are today regulations governing the form of submissions which make it clear that they must "clearly set forth" the new rule with "[a]n explanation of the difference between the submitted change affecting voting and the existing law or practice * * *." 28 C.F.R. 51.5, 51.10(a)(4).

as he must, on the State's representations as to what changes of substance had been made by the new Code.

3. Nor was the Court justified in relying on the letter of March 30, 1973, from the Assistant Attorney General to the Harris County Ordinary. To be sure, that letter recites that the new Georgia Election Code "was submitted to the Attorney General in 1970" and "no objection was interposed," implying that the section which required numbered posts had then been approved *sub silentio*. That was, of course, an error, since that provision had not in fact been submitted for consideration and could not, on the face of the Code, have been seen to be a change. But the letter also, and primarily, withdraws the objection previously interposed to the use of numbered posts on the ground that the requirement had "been in effect for county-wide elections * * * since 1964" and that "Harris County ha[d] been holding its elections [under that rule] since 1964." See App., *infra*, p. 14A. Plainly, if those representations were correct,[7] there had been no relevant change in Harris County that called Section 5 into play and the Assistant Attorney General's withdrawal of objection was correct.

At all events, the partial mistake by the Assistant Attorney General cannot bar vindication of the public interest. See, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. 180; *United States* v. *San Francisco*, 310 U.S. 16, 31–32; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409. There is no showing

[7] See note 2, *supra*, p. 10.

that the State of Georgia, or any county other than Harris County, relied on the 1973 letter. In these circumstances, it would be quite wrong, we submit, to treat a secondary reason given in a clearance decision affecting a single county as preventing implementation of Section 5 of the Voting Rights Act for the entire State.[8]

4. We pursue the case because it involves a change in voting procedures which has a serious potential for racial discrimination. See *White* v. *Regester*, 412 U.S. 755, 765–766. Indeed, the Department of Justice has objected to statewide numbered post or majority vote provisions in Louisiana, Mississippi and North Carolina, and to nineteen such changes in Georgia itself with respect to governmental units not covered by the 1964 statute involved here. It would be anomalous to waive a similar objection in the case of counties—at least eleven in number—where the matter remains open to challenge.

To be sure, as the district court noted, it is late in the day to be questioning a practice that has been effective for many years. But the lion's share of that delay cannot be attributed to the Department of Justice. The fact is that the State did not submit the

[8] The court also cited *Pitts* v. *Cates*, 536 F. 2d 56 (C.A. 5), as evidence that the majority vote provision had been precleared by the Attorney General. It is true that the opinion in that case mentions, without discussion, that this requirement had been precleared by the Attorney General in 1970, but the United States was not a party to that case and had no opportunity to correct the error. Here, the mistake in the 1973 letter *was* brought to the court's attention.

257-068—78——3

change for approval, no doubt under the misapprehension that because it was ordained by a statute enacted before November 1964 it might escape scrutiny. That was, perhaps, an arguable view before this Court's decision in *Perkins* v. *Matthews, supra,* 400 U.S. at 394–395. But we note that, except for Harris County, no submission has been made since that decision was handed down in January 1971. On this record, it ill behooves Georgia to complain that the government has been dilatory. And, in any event, the right of citizens to be free from potential voting discrimination cannot be sacrificed to considerations of laches.

CONCLUSION

For the foregoing reasons, we believe the judgment of the district court should be reversed. It may be, however, that plenary consideration is unnecessary, especially in light of this Court's intervening decision in *United States* v. *Sheffield Board of Comm'rs, supra.* In our view, the decision below is so plainly erroneous as to justify summary reversal.

Respectfully submitted.

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MARCH 1978.

APPENDIX

Supreme Court of the United States

No. A–606

UNITED STATES, APPELLANT,

v.

GEORGIA

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including March 28, 1978.

/s/ Lewis F. Powell, Jr.,
LEWIS F. POWELL, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of January, 1978.

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Civil Action No. C76-1531A)

UNITED STATES OF AMERICA

v.

THE STATE OF GEORGIA, GEORGE BUSBEE, BEN FORTSON, Jr., SHIRLEY ALTMAN, D. B. HOWE, Sr., OSCAR PERSONS AND M. M. "MUGGSY" SMITH, MEMBERS OF THE STATE ELECTION BOARD; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE, MARG THURMAN, CHAIRPERSON AND THE STATE REPUBLICAN EXECUTIVE COMMITTEE, MACK MATTINGLY, CHAIRPERSON

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, the plaintiff named above, appeals to the Supreme Court of the United States from the final order and judgment dismissing the complaint entered in this action on September 30, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1253.

WILLIAM L. HARPER,
United States Attorney,
428 U.S. Courthouse,
Atlanta, Georgia 30303.

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Civil Action No. C76-1531A)

UNITED STATES OF AMERICA

vs.

THE STATE OF GEORGIA, GEORGE BUSBEE, BEN FORTSON, Jr., SHIRLEY ALTMAN, D. B. HOWE, Sr., OSCAR PERSONS AND M. M. "MUGGSY" SMITH, MEMBERS OF THE STATE ELECTION BOARD; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE, MARG THURMAN, CHAIRPERSON AND THE STATE REPUBLICAN EXECUTIVE COMMITTEE, MACK MATTINGLY, CHAIRPERSON

JUDGMENT

This action came on for consideration before the Court, Honorable James C. Hill, United States Circuit Judge, Honorable Charles A. Moye, Jr., United States District Judge and Honorable William C. O'Kelley, United States District Judge, and the issues having been duly rendered,

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Civil No. C76-1531A)

UNITED STATES OF AMERICA

vs.

THE STATE OF GEORGIA, ET AL.

Before HILL, Circuit Judge; MOYE and O'KELLEY, District Judges.

(5A)

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed and that defendants THE STATE OF GEORGIA, GEORGE BUSBEE, BEN W. FORTSON, JR., SHIRLEY ALTMAN, D. B. HOWE, SR., OSCAR PERSONS and M. M. "MUGGSY" SMITH, THE STATE DEMOCRATIC EXECUTIVE COMMITTEE, MARG THURMAN, Chairperson and THE STATE REPUBLICAN EXECUTIVE COMMITTEE, MACK MATTINGLY, Chairperson recover of the plaintiff UNITED STATES OF AMERICA, their costs of action.

Dated at Atlanta, Georgia, this 30th day of September, 1977.

Filed and entered in Clerk's Office this 30th day of Sept., 1977.

BEN H. CARTER, *Clerk.*
By: PATSY L. DANIELS,
Deputy Clerk.

BEN H. CARTER,
Clerk of Court.
By: PATSY L. DANIELS,
Deputy Clerk.

(4A)

ORDER

Per Curiam

This civil action is before the court on defendants' motion to dismiss or, in the alternative, for summary judgment and on plaintiff's motion for summary judgment. The United States Justice Department on September 17, 1976, filed an action in this court seeking an order requiring the State to submit two provisions of the Georgia Election Code of 1964 to the Attorney General of the United States for clearance pursuant to the Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.* The case was submitted to a three-judge panel, which determined that ruling should be postponed until after the general election and that a ruling should be made based on cross motions for summary judgment. The case was set down for oral argument on April 28, 1977, and heard by the court at that time.

In the spring of 1964, the Georgia General Assembly in an extraordinary session completely revised the Georgia Election Code. The resulting bill, Act. No. 26, Ga. Laws 1964, p. 26 (Ga. Code Ann. 34–101 *et seq.*), was signed by the governor on June 24, 1964. The new election code provided at § 34–1002 that candidates seeking one of two or more public offices, each having the same title and to be filled at the same election by vote of the same electors, would have to designate which specific office and post they were seeking within a given district. At § 34–1514 the new code provided that a majority vote was required to nominate or elect in all elections within the purview of the election code. These two provisions contained a sentence which *excluded* candidates for election to the governing authority of a county from the requirement of designating a post and district and from the requirement of majority vote for the year 1964.

The Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.* became effective in August, 1965. The Act provided that in certain states and political subdivisions any change in the voting standard, function, or procedure after November, 1964, must be cleared by approval of the District Court for the District of Columbia or the Attorney General of the United States prior to its being put into effect. Georgia is a state covered by the Act. In the case *sub judice,* the Justice Department contends that the provisions in question, former Ga. Code Ann. § 34–1002 and former Ga. Code Ann. § 34–1514, were subject to the preclearance provisions of the Voting Rights Act of 1965 in that they constituted a change in voting procedure within the meaning of the Act. This reasoning is based on the argument that since these provisions of the Georgia Election Code did not go into effect until after November, 1964, they are subject to the Act even though the Georgia Election Code of which they are a part was enacted *prior to* the Voting Rights Act. The United States requests that the court declare that implementation of the changes to majority vote and designated posts in primaries and elections for county governing bodies violates section 5 of the Voting Rights Act of 1965 and that the court enjoin defendants from implementing the changes until the requirements of section 5 have been satisfied.

The State's motion to dismiss or, in the alternative, for summary judgment is based upon three main arguments: (1) that the voting practices complained of were in force prior to November 1, 1964, and, consequently, not required to be submitted to the District Court for the District of Columbia or the Attorney

General of the United States for approval prior to implementation; (2) that the provisions complained of have been repealed; and (3) that the provisions complained of were, in fact, properly submitted and approved by the Attorney General.

The argument that the provisions at issue did not constitute changes within the meaning of the Voting Rights Act in that they were part of an election code enacted prior to the passage of the Voting Rights Act has been dealt with by the Supreme Court of the United States in *Perkins* v. *Matthews,* 400 U.S. 379 (1971), in a slightly different factual setting. In *Perkins* the appellants, voters and candidates for city office, sought to enjoin the 1969 city election in Canton, Mississippi, on the grounds that changes in election procedure and certain boundary changes since November, 1964, had not been precleared. Among the changes complained of was a change from election by ward to at-large election of aldermen. As the Court noted, the question of a change in this instance arose in a "peculiar context." The change had been enacted by a Mississippi statute of 1962 but had been *ignored* by the city in the election of 1965. The Court found that a belated implementation of the at-large election of aldermen requirement in the 1969 election would constitute a change within the meaning of the Voting Rights Act of 1965:

> We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under § 5. That section in express terms reaches any standard, practice, or procedure "different from that in force or effect on November 1, 1964." In our view, § 5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date.

Id. at 394. It seems clear that if the Court found implementation of an election provision in effect prior to November 1, 1964, to constitute a change requiring preclearance under the Voting Rights Act, a change in election procedure passed prior to the Act but effective after the Act would constitute a change within the meaning of the Act. Consequently, the State's argument that no preclearance was necessary for the complained of sections must fail.

The State's second argument is that the provisions complained of have been repealed and are no longer in effect. The State contends that § 34–1002 of the 1964 election code was stricken in 1970 by Ga. Laws 1970, pp. 347, 354, and § 34–1514 was stricken by Ga. Laws 1969, pp. 292, 293. While an examination of the pages cited in the laws of 1969 and 1970 reveals that the sections complained of have indeed been amended and, in fact, have section numbers different from the numbers assigned these provisions in the 1964 election code, the fact remains that in *substance* there has been no change in the requirement that candidates seeking party nomination for or election to the governing authority of a county shall be elected by a majority vote and shall, in case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the vote of the same electors, designate the specific office sought. *See* Ga. Laws 1964 at 174–75; Ga. Laws 1969 at 306–07; Ga. Laws 1970 at 380–31; Ga. Laws 1971 at 603–04 to trace the development of § 34-1514. *See* Ga. Laws 1964 at 80; Ga. Laws 1970 at 369 to trace the development of § 34–1002. Inasmuch as the changes complained of—the post-November 1, 1964, application of majority vote and designated office to candidates for nomination or election to the governing authority of a county—are still in effect, the State's

argument that the sections complained of have been repealed must fail.

The State's final argument on behalf of its motion for summary judgment is that there has been no violation of section 5 of the Voting Rights Act of 1965 inasmuch as the complained of sections have, in fact, been precleared by the Attorney General of the United States. The reasoning behind this argument is that since after implementation of the change in voting procedure complained of the Attorney General had occasion to consider the election code of Georgia in 1968, 1969, 1970, and 1971, he could have discovered that the complained of provisions had taken effect with regard to candidates for governing office of a county after November 1, 1964. Since the Attorney General *could have* discovered the change and objected to it, the State concludes that the fact that he did not object signifies that the change was approved. Central to the question of whether the provisions complained of have, in fact, been precleared is a determination of what constitutes a "submission" of a change within the meaning of the Voting Rights Act of 1965. Prior to September, 1971, there were no regulations specifying the proper manner in which a submission should be made. However, in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), the Supreme Court discussed the meaning of a "submission" as follows:

> While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a "submission." A fair interpretation of the Act requires that

> the State in some unambiguous and recordable manner submit any legislation or regulation directly to the Attorney General with a request for his consideration pursuant to the Act.

Id. at 571.

The entire election code of Georgia has been before the Attorney General on four occasions since 1965: in 1968, 1969, 1970, and 1971. The State argues that the Attorney General's access to the entire election code, which contained the changes complained of, but without their being specifically pointed out, constituted an effective submission of these provisions. The State relies upon the 1970 submission as particularly compelling. In 1970 the State requested review of the entire election code, which had been revised to place political primaries under the supervision of elected county and state officials. The language of this 1970 submission is interesting: "The Bill revises the Election Code in all respects to reflect this intention, together with certain other minor housekeeping changes which are self-explanatory." This clearly indicates that the election code should be reviewed in its entirety.

In the absence of any requirement that a specific submission procedure be followed, this court finds that the submission of the entire election code of Georgia to the Attorney General with the request that he consider any changes constituted a submission of the matter to the Attorney General in an unambiguous and recordable manner as required by *Allen*. That the Attorney General was, in fact, aware of and had no objections to the two provisions complained of is strongly indicated by a letter which was not brought to the court's attention prior to the oral hearing. In this letter of March 30, 1973, designated as exhibit G

of stipulations of fact, Stanley Pottinger, Assistant Attorney General, Civil Rights Division, assured the Ordinary of Harris County that the designated post requirement specified in § 34–1015 of the Georgia Election Code, which was identical to former § 34–1002 of the 1964 Election Code, had been submitted to the Attorney General in 1970 and that no objection had been interposed. That the majority vote provision had also been precleared is indicated by the decision of the United States Court of Appeals for the Fifth Circuit in *Pitts* v. *Cates*, 536 F. 2d 56 (5th Cir. 1976), in which it is clear that the court considered that provision as precleared by the Justice Department in 1970. Thus, there is evidence of general acceptance of the fact that both of the provisions complained of were in fact precleared in 1970.

Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action for declaratory and injunctive relief to force the State to submit the complained of provisions to a preclearance procedure is inexcusable and, if allowed, would have placed the electoral system of the state of Georgia in an uproar on the eve of a general election. For the Justice Department to attack provisions of the Georgia Election Code which have been in effect for eleven years on the sole basis that said provisions have not been precleared and with no allegations that these provisions are in any manner violative of the letter or the spirit of the fifteenth amendment to the United States Constitution borders on the absurd.

Judgment shall be entered for the defendants.

IT IS SO ORDERED this 30th day of September, 1977.

JAMES C. HILL,
United States Circuit Judge.
CHARLES A. MOYE, JR.,
United States District Judge.
WILLIAM C. O'KELLEY,
United States District Judge.

March 30, 1973.

Mr. ROY MOULTRIE,
Ordinary, Harris County,
Hamilton, Georgia 31311

DEAR MR. MOULTRIE: Reference is made to our letter of December 5, 1972 interposing an objection on behalf of the Attorney General to the creation of a residential post requirement for county commissioner elections under Section 2 of Georgia Act 1359 submitted by you pursuant to Section 5 of the Voting Rights Act of 1965, as amended.

On February 1, 1973 we received a letter from Mr. William B. Steis, an attorney acting on behalf of Harris County, stating that a designated post requirement has been in effect for county-wide elections in the State of Georgia since 1964 as specified in § 34–1015 of the Georgia Election Code, and that Harris County has been holding its elections pursuant to that act since 1964. Our subsequent examination of this situation indicates that this statute was submitted to the Attorney General in 1970 pursuant to Section 5 of the Voting Rights Act of 1965 and no objection was interposed.

Viewed in this light it appears that the only change effected by Section 2 of Act 1359 is from a county-wide residency requirement to a district residency requirement. Under these circumstances, and based upon our evaluation of the change contained in Section 2 of Act 1359, the objection to that section interposed by our letter of December 5, 1972 is hereby withdrawn.

We feel a responsibility, however, to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the plan.

Sincerely,

/s/ J. Stanley Pottinger,
J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

U.S. GOVERNMENT PRINTING OFFICE: 1973